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## **A possible direction of consumer contract law in Europe**

### **Abstract**

*The purpose of this contribution is to provide an analytical survey and to explore the change the Commission's proposal regarding a future directive on consumers' rights might bring into the European and therefore the national consumer contract laws. The paper recognises that consumer confidence is of key importance for the effective functioning of the internal market and to boosting the economy. While legal regulation is just one way of boosting consumer confidence, this paper focuses only this issue. As such, it examines the relevant parts of the proposal in detail.*

*The main aim of the present paper is not to provide a full-fledged overview and analysis of European consumer contract law. Its only aim is to provide a possible basis for the discussion of the topic at the conference to be held at Eötvös Loránd University of Sciences Faculty of Law at the end of April 2011. The final version of this paper incorporating the findings and conclusions of the conference will be available after the conference.*

### **Opening thoughts**

In October 2008, the Commission said that there must be a new law regarding consumer contract law in Europe in order to enhance consumer confidence<sup>1</sup>, and proposed a directive to harmonise consumer rights to the maximum extent. Having uniform law all over Europe regarding consumer contracts is inevitable, argued the Commission. The Commission is partly right. When talking about confidence, we cannot overlook the fact that confidence and trust in general are of key importance in every society and so in every economy. They are even more essential for cross-border trading, especially in a situation when there are cultural, social and economical differences in the countries affected. This is the case in the European Union. There are several well-known and applied methods for boosting confidence in a society, covering both legislative and other means. One option can that opted for by the Commission, namely legal regulation, in a way that allows no window for the Member States to differ from the common, harmonised rules. If this is the case, it is very much on the legislator – in our case the institutions of the European Union – to establish a set of rules that are really capable of meeting the different needs of the various players in the market. Confidence in the market can be achieved and enhanced only when all the interested market players are satisfied. When we talk about consumer markets, these players are the consumers and the traders. In general, the relationship – and here I mean the contractual relationship - between these actors is regulated by private law rules and principles, each of which stems from traditional national rules and principles. Rome I<sup>2</sup> and in certain instances Rome II<sup>3</sup> might be applicable, but these are conflict of law rules and do not contain substantive rules for contractual matters. Through the application of these rules we always end up with the application of the law of a nation

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<sup>1</sup> See: Green Paper on the Review of the Consumer Acquis, COM(2006) 744 final, page 8.

<sup>2</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) OJ L 177, 4.7.2008, p. 6–16

<sup>3</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) OJ L 199, 31.7.2007, p. 40–49

state, be a Member State or a third country. This law is typically the law of the consumer.<sup>4</sup> The question is therefore how the European Union can effect and create a standard set of contractual rules in all the Member States in order to provide for a harmonised and single consumer contract law environment.<sup>5</sup>

To achieve this desired unique single consumer law in Europe, the Commission drafted and submitted its proposal for a directive on consumer rights in the autumn of 2008.<sup>6</sup> The proposal is the result of a bottom-up approach based on the review of the consumer acquis. The review was started in 2004<sup>7</sup> with the objective of achieving a simplified and complete regulatory framework, and covered eight consumer directives.<sup>8</sup> The review process was outlined in the 2004 *Communication on European Contract Law and the revision of the acquis: the way forward*.<sup>9</sup> The main focus of the review was to find out how an appropriate balance between a high level of consumer protection and the competitiveness of enterprises could be achieved. This question is of crucial importance, since reaching – and what is more

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<sup>4</sup> Rome I. Art. 6., But even where the law of the consumer's habitual residence do not govern the contract, the mandatory consumer protection rules of the consumer's country will still be applicable. That being the case, there is still a risk that traders might be reluctant to offer their goods or services to certain countries if that would mean having to comply with different consumer protection standards. See: Christian Twigg-Flesner and Daniel Metcalfe: The proposed Consumer Rights Directive – less haste, more thought?, at page 3, available at <http://ssrn.com/abstract=134578>. For an argument of the place of mandatory contract law rules in the European legislation (arguing that, although in principle mandatory rules should be the exception, in the current European legislation mandatory law is not the exception but the rule). See: Gerhard Wagner: Mandatory contract law: functions and principles in the light of the proposal for a directive on consumer rights. Erasmus Law Review, Volume 3, Issue 1 (2010) 47 – 70. Also see: Martin Ebers: Mandatory Consumer Law, Ex Officio Application of European Union Law and Res Judicata: From Océano to Asturcom, available at <http://ssrn.com/abstract=1709347>

<sup>5</sup> As will be discussed later, according to some authors, having a harmonised, single set of contract rules is not as important as the Commission assumes. The typical example raised is the one we can see in the United States of America. In the U.S., beside the UCC, there is no single set of contract rules and, even with the fragmented state law, cross-border commerce evolves and increases.

<sup>6</sup> It has to be noted that, while the Commission talks about consumer rights in the directive, it is really about contractual rights. As such a more appropriate title for the proposal would have been e.g. ... directive on the consumer's contractual rights. Also, since the title assumes that the proposed directive regulates consumer rights, it would have been necessary to insert an article that *epressis verbis* names the rights accorded to consumers by the directive.

<sup>7</sup> COM(2004) 651 final, OJ C 14, 20.1.2005, p.6.

<sup>8</sup> Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises OJ L 372, 31.12.1985, p. 31–33, Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours OJ L 158, 23.6.1990, p. 59–64, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts OJ L 95, 21.4.1993, p. 29–34, Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis OJ L 280, 29.10.1994, p. 83–87 (meanwhile this directive has been repealed by Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts (Text with EEA relevance) OJ L 33, 3.2.2009, p. 10–30), Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts OJ L 144, 4.6.1997, p. 19–27, Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers OJ L 80, 18.3.1998, p. 27–31, Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests OJ L 166, 11.6.1998, p. 51–55 (meanwhile this directive has been repealed by Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (Codified version) Text with EEA relevance OJ L 110, 1.5.2009, p. 30–36), Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees OJ L 171, 7.7.1999, p. 12–16

<sup>9</sup> COM(2004) 651 final, OJ C 14, 20.1.2005, p.6.

important – being able to keep the right balance is the bottom-line of confidence in the market.

The original proposal was aimed at revising four directives that already provided for consumer contractual rights and merging them into a single horizontal instrument regulating the common aspects in a systematic fashion, simplifying and updating the existing rules, removing inconsistencies and closing gaps. These four directives are: Directive 85/577/EEC on contracts negotiated away from business premises<sup>10</sup>, Directive 93/13/EEC on unfair terms in consumer contracts<sup>11</sup>, Directive 97/7/EC on distance contracts<sup>12</sup>, and Directive 1999/44/EC on consumer sales and guarantees<sup>13</sup>.

### **The work in the Commission, the Council and the European Parliament on the Proposal**

The Commission submitted its proposal to the European Parliament and the Council based on article 95 of the EC Treaty (now Article 114 of the Treaty on the Functioning of the European Union) on October 13 2008. On November 8, 2008 the Council decided to consult the Economic and Social Committee, which issued its opinion on the matter on July 16 2009.<sup>14</sup> The Committee of the Regions (CofR) adopted its opinion on the proposal at its 79<sup>th</sup> plenary session on April 21-22 2009.<sup>15</sup> In its opinion, CofR heavily criticised the proposal. CofR was sceptical about the ability of the proposal to enhance consumer confidence and, therefore CofR did not support the proposed full harmonisation approach.<sup>16</sup> The proposal was examined during the French, Czech, Swedish, Spanish and Belgian Presidencies. A progress report was presented at the Competitiveness Council of May 2009 and two policy debates were organised at the Competitiveness Councils of December 2009 and May 2010. During the meetings of the Council Working Group, several of the proposal's provisions were heavily criticised and attacked by the delegations. The main problematic issues were the question of the level of harmonisation, the information requirements, the scope of the directive, the legal rights and remedies under the contract, and its coverage of unfair contractual terms. Consensus could be foreseen on many of these issues, but two of these, the issue of legal remedies and unfair contractual terms, seemed to be insoluble in the near future. As such in December 2010, the Belgian Presidency in order to have a compromised text<sup>17</sup> decided to alter the proposal substantially by cutting out two of its chapters, the ones on legal remedies and unfair contractual terms. Regarding the other issues, several simplifications and clarifications were proposed by the Presidency. For example, the approach of full harmonisation was toned down to targeted harmonisation, i.e., that not the whole but only certain provisions of the proposal should be aimed at full harmonisation. Some refinement also took place regarding the information requirements and the scope and definitions of the proposal. At the Coreper meeting that took place on December 8 2010, a qualified majority supported the Presidency's

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<sup>10</sup> Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ L 372, 31.12.1985, p. 31–33

<sup>11</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, p. 29–34

<sup>12</sup> Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144, 4.6.1997, p. 19–27

<sup>13</sup> Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 7.7.1999, p. 12–16

<sup>14</sup> The rapporteur was Mr Bernardo Hernandez Bataller (ES/Group III). OJ C 317 of 23.12.2009, p.54.

<sup>15</sup> The rapporteur was Mr Wolfgang G. Gibowski (DE/PPE). Opinion of the Committee of the Regions on consumer rights, OJ C 200 of 25.8.2009, p. 76.

<sup>16</sup> The relevant parts of the opinion shall be discussed in detail in the relevant parts of the paper..

<sup>17</sup> Proposal for a Directive of the European Parliament and of the Council on consumer rights – general approach, 16933/10, 10 December 2010, 2008/0196 (COD)

compromise text. Malta<sup>18</sup>, Spain<sup>19</sup> and Slovakia announced their opposition to the text and Germany maintained a scrutiny reservation. Austria<sup>20</sup> and Portugal<sup>21</sup> also issued their statements on the modified and adopted compromised text.<sup>22</sup>

The Internal Market and Consumer Protection Committee of the European Parliament discussed the proposal in early 2011 and adopted its consolidated version of the proposal on February 9 2011. The European Parliament is expected to adopt its position at the first reading at the plenary of March 2011.

### **General overview of the structure of the original proposal**

The 2008 original proposal comprised five main chapters. Each chapter essentially corresponded to the directives to be repealed, except for the first one, which was devoted to general principles and definitions. It is important to note that most of these definitions had already been present in the various Directives. However, due to the minimum harmonisation approach of those Directives, the Commission considered it an important element to give harmonised meanings to these concepts. There are new elements as well, such as the concept of private and public auction. Chapter II and III deal with most of the information issues that were previously regulated in the distance selling and doorstep selling Directives. It contains a

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<sup>18</sup> Malta strongly supported the original ambitious objective of full harmonisation and broad scope, therefore regrets that the compromise text has significantly narrowed the scope and that, although it is based on full harmonisation, it contains significant derogations which create legal uncertainty in cross-border transactions for both consumers and businesses. Moreover, Malta opposes the exclusion of certain important economic sectors, in particular gambling, from the scope of the compromise text. Online gambling currently falls within the scope of Directive 97/7/EC on distance contracts. Consequently, there will be a deregulation of online gambling from consumer protection rules regulating distance contracts. Furthermore – in line with the CofR - , Malta does not support the revocation of harmonised rules, in particular when no impact assessment has been carried out to assess the implications of this exclusion. Furthermore, the impact assessment accompanying the original Commission proposal did not mention any problem with the applicability of Directive 97/7/EC on distance contracts to online gambling, and consequently Malta sees no justification for any deregulation from the consumer acquis.

<sup>19</sup> Spain did not support the compromise text because, as a consequence of the principle of maximum harmonisation which governs a large number of the provisions, consumers would be deprived of some of the rights already accorded to them under Spanish national legislation. Moreover, that principle of maximum harmonisation deprives Member States of meeting the new challenges arising from the presence on the market of new forms of business and hence of contracting, which could, for example necessitate pre-contractual information requirements which are different from or more demanding than those provided for in the proposal. An example where the Spanish law is more consumer friendly than the proposal is when the trader fails to deliver the goods within the delivery period laid down in the contract. The Spanish law does not require the consumer to contact the trader in order to set an additional period. Another example could be the question of charging the consumer for the normal use of the goods during a withdrawal period. That provision reduces the level of consumer protection afforded not only by Spanish law but also by the Directive in force, as demonstrated by Court of Justice of the European Union case law. For this reason, Spain argued that a balanced solution must be found, so that the consumer is charged for the use of the goods only if such use results in damage or obvious wear for which the consumer is responsible.

<sup>20</sup> Austria recalled that the purpose of the Consumer Rights Directive is to create a set of rules which strikes the right balance between a high level of consumer protection and the competitiveness of enterprises, and warned that some of the provisions of the compromise text could create a considerable burden for small and medium-sized enterprises all over Europe. The CRD, as it stands after the compromised text, is in contradiction with the goals of the Council Conclusions on "Think Small First – A Small Business Act for Europe".

<sup>21</sup> Portugal regretted the decision to delete Chapters IV and V from the proposal, since both are essential for consumer protection. In connection with the shift in the level of harmonisation, the opinion of Portugal is that minimum harmonisation rules are more effective in safeguarding a high level of consumer rights in the single market. It therefore expects that Member States may be allowed to keep or introduce more protective rules regarding the information requirements and the procedures for exercising the right of withdrawal.

<sup>22</sup> See: Note to the Proposal for a Directive of the European Parliament and of the Council on consumer rights - General approach, 16933/10, ADD 1, 16 December 2010 and ADD 1 REV 1, 17 December 2010.

core of information to be provided by traders prior to the conclusion of all consumer contracts, as well as an information obligation on intermediaries concluding contracts on behalf of consumers. Chapter III only applies to distance and off-premises contracts, provides for specific information requirements and regulates the right of withdrawal in a consistent manner, and also refers to a standard withdrawal form. Chapter IV clarifies the provisions of Directive 99/44/EC. Among others, it maintains the principle that the trader is liable to the consumer for a period of two years if the goods are not in conformity with the contract. Moreover, it introduces a new rule whereby the risk of loss or damage of the goods is transferred to the consumer only when they or a third person other than the carrier and indicated by them acquires material possession of the goods. The last substantive chapter, Chapter V, reflects the provisions of the unfair contractual terms Directive. These rules apply to unfair contract terms which have not been individually negotiated, such as standard contract terms. Unfair terms are those creating significant imbalances in the rights and obligations of consumers and of traders and are not binding on consumers. In order to ensure legal certainty, the proposal contained two lists of unfair terms. The first is the so-called black list, a list of terms which are considered unfair in all circumstances. The second list is the grey list, setting out the terms which are deemed unfair unless the trader proves otherwise. These same lists would have applied in all Member States and may have only been amended by the comitology procedure provided for by the proposal.

The structure of the proposal was significantly changed by the Belgian Presidency in December 2010. The Belgian Presidency, in order to achieve compromise – due to the divergence in the standpoints of the Member States in the Council working group – cut out several parts of the proposal, the most important change was the elimination of the chapters on consumer guarantees and unfair contractual terms. This means that the Presidency also narrowed the scale of codification, since Directives 1999/44 and 93/3 now fall out of the scope of the proposal.<sup>23</sup>

### **The scope of the proposed directive**

Chapter I of the proposal sets up the sphere of application of the provisions. According to Article 1, the aim and therefore the subject matter of the directive is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating certain aspects of the laws, regulations and administrative provisions of the Member States concerning contracts between consumers and traders. It is important to note that the proposal only regulates the key aspects of consumer contract law and does not interfere with more general contract law concepts.<sup>24</sup> The field harmonised by the original proposal covered the information to be provided before the conclusion and during the performance of the contract, the right of withdrawal from distance and off-premises contracts, consumer rights specific to contracts of sale and unfair contract terms in consumer contracts.<sup>25</sup>

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<sup>23</sup> European consumer organizations did not welcome this solution to reach the desired compromised text. For example, Monique Goyens, director-general of EU consumer organisation BEUC, said: "If the EU seeks a single market for Europeans, a modern system of consumer rights should be its basis, thereby empowering consumers. [Friday] is a missed opportunity. Legislators negotiated lengthily to give this law good value, but what [was] put before the Council represents a significant U-turn," . For more on this see: Belgian Presidency paves way for consumer rights deal, 13 December 2010, available at <http://www.euractive.com>

<sup>24</sup> For a background on the relationship between European law and national contract law, and also the issue of private contracts in union law see: Paul Verbruggen: The Public – Private Divide in Community Law: Exchanges across the Divide *in* S. Gshwandter, V. Kosta, H. Schebesta and P. Verbruggen: The Impact of the Internal Market on Private Law of Member Countries, EUI Working Papers, LAW 2009/22, pp. 9 – 14, at 17.

<sup>25</sup> CRD preamble 9.

It focused only on issues of consumer contract law that were already regulated.<sup>26</sup> An important feature of the proposed rules is that the provisions would apply both to domestic and cross-border contracts. This intrusion into national contract law generated many concerns. However, according to the Commission, the inclusion of domestic transactions within the scope was necessary in order to avoid a situation where both the traders and consumers must work with different legal regimes depending on whether they are concluding a domestic or a cross-border transaction. Again, the Commission's reasoning is still based on the assumption that the different national contract law rules are the real obstacles to cross-border trade within the European Union.

### Definition of consumer contract

The proposal applies to **consumer contracts** in general: according to the original Article 3.1., the directive – if adopted - shall apply, under the conditions and to the extent set out in its provisions, to sales and service contracts concluded between the trader and the consumer. It is important to note, that beside this general rules, certain provisions of the proposal apply only to distance contracts or off-premises contracts (or as some call them direct sale contracts) or both. Also, there are areas of consumer contracts<sup>27</sup> where the applicability of the provisions are limited.<sup>28</sup> Finally, certain types of consumer contracts are excluded from the scope of certain provisions, such as the provisions relating to the right of withdrawal.<sup>29</sup>

Although it contains a definition for sales contract<sup>30</sup> and service contract<sup>31</sup>, the original proposal itself does not propose a new approach towards the definition of consumer contract in general. It follows the well-known route that it defines the contract by defining the parties concluding the contract. The proposal therefore provides for the definition of consumer and trader. Consumer means any natural person who, in contracts covered by the directive, is acting for purposes which are outside their trade, business, craft or profession.<sup>32</sup> It is important, that only a natural person can qualify as a consumer.<sup>33</sup> Trader<sup>34</sup> means any natural

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<sup>26</sup> The proposed directive does not affect national law in the area of contracts relating to employment, contracts relating to succession rights, contracts relating to family law and contracts relating to the incorporation and organisation of companies or partnership agreements. See: Proposal for a Directive of the European Parliament and of the Council on consumer rights, 16933/10, preamble 8a.

<sup>27</sup> E.g. Consumer financial services. The underlying reason for this is that existing Union legislation on consumer financial services contains numerous rules on consumer protection. For this reason the provisions of the proposal cover contracts relating to financial services only insofar as this is necessary to fill the regulatory gaps. See: CRD preamble 11.

<sup>28</sup> Article 3

2. This Directive shall only apply to financial services as regards certain off-premises contracts as provided for by Articles 8 to 20, unfair contract terms as provided for by Articles 30 to 39 and general provisions as provided for by Articles 40 to 46, read in conjunction with Article 4 on full harmonisation.

3. Only Articles 30 to 39 on consumer rights concerning unfair contract terms, read in conjunction with Article 4 on full harmonisation, shall apply to contracts which fall within the scope of Directive 94/47/EC of the European Parliament and of the Council<sup>1</sup> and of Council Directive 90/314/EEC.

4. Articles 5, 7, 9 and 11 shall be without prejudice to the provisions concerning information requirements contained in Directive 2006/123/EC of the European Parliament and of the Council<sup>3</sup> and Directive 2000/31/EC of the European Parliament and of the Council.

<sup>29</sup> Actually the right of withdrawal was the area that generated a huge majority of doubts.

<sup>30</sup> Article 2 (3) 'sales contract' means any contract for the sale of goods by the trader to the consumer including any mixed-purpose contract having as its object both goods and services;

<sup>31</sup> Article 2 (5) 'service contract' means any contract other than a sales contract whereby a service is provided by the trader to the consumer;

<sup>32</sup> Art. 2. 1.

<sup>33</sup> While it is outside the scope of the present paper, it has to be mentioned that, in several Member States, it is not as straightforward as only natural persons can qualify as consumers. Actually, there are initiatives and

or legal person who is acting for purposes relating to their trade, business, craft or profession and anyone acting in the name of or on behalf of a trader.<sup>35</sup> CofR, in its opinion, suggested that these definitions are not precise enough and tighter definitions would be necessary.<sup>36</sup>

### **The concept of distance contract**

However, the proposal amends the **concept of distance contract** and off-premises contract. The definition of distance contract was introduced into the law of the European Union by Directive 97/7. Article 2 (2) of the distance selling directive defines a distance contract as any contract concerning goods or services concluded between a supplier and a consumer under an organised distance sales or service-provision scheme run by the supplier, who, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded. Based on this definition we can see that distance contracts are characterised by two elements. The first decisive element is that the two contracting parties – the supplier and the consumer - are not physically and simultaneously present together when distance contracts are prepared and concluded. The second characteristic element is that these transactions are carried out under an organised distance sales or service-provision scheme run by the supplier, who makes exclusive use of distance communication techniques. These two decisive elements must be present when the contract is concluded.<sup>37</sup> The original proposal changes this scheme. According to the proposal, distance contract means any sales or service contract where the trader, for the conclusion of the contract, makes exclusive use of one or more means of distance communication.<sup>38</sup> Means of distance communication include any means which, without the simultaneous physical presence of the trader and the consumer, may be used for the conclusion of a contract between those parties.<sup>39</sup> As can be seen, the drafters eliminated the requirement for an *organised distance selling scheme*. This new, broader definition of distance contract covers all cases where sales and service contracts are concluded exclusively using one or more means of distance communication (such as mail order, Internet, telephone or fax). According to the Commission, this would create a wider level playing field for all distance traders. This new approach can improve legal certainty compared to the current definition requiring the presence of an organised distance selling scheme run by the trader up to the conclusion of the contract.<sup>40</sup> The particular circumstance under which an offer is made or the contract is negotiated is relevant in the new definition of a distance contract. The fact that the trader is an occasional distance seller or that he uses an organised scheme run by a third party, such as an online platform, is also irrelevant and does not deprive consumers of the protection accorded by the directive. Moreover, a contract negotiated face to face between the trader and the consumer away from business premises is also considered to be a distance contract, if the contract is concluded through the exclusive use of means of distance

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attempts in national law-making that entities being in the same negotiating position as a consumer could qualify as consumers for the sake of protection.

<sup>34</sup> CCBE suggested changing the English term „trader” to „professional”. In this way it might be possible to mitigate any possible discrepancies between the English and the French version of the future directive. Moreover, the term “trader” is not appropriate when talking about legal services, since the business of a “trader” is incompatible with the profession of a lawyer. See: CCBE Position on the Proposal for a directive of the European Parliament and the Council on consumer rights directive. p. 3. available at: <http://www.ccbe.org>

<sup>35</sup> Art. 2. 2.

<sup>36</sup> See: Opinion point 16.

<sup>37</sup> See: Opinion of Advocate General Paolo Mengozzi delivered on 28 January 2010 in Case C-511/08 Verbraucherzentrale Nordrhein-Westfalen eV v Heinrich Heine GmbH, para 27 – 28.

<sup>38</sup> Art. 2. 6.

<sup>39</sup> Art. 2. 7.

<sup>40</sup> CRD preamble 12.

communication, such as the Internet or telephone. For traders, this simplified but extended definition of distance contracts can improve legal certainty and protect them from unfair competition, argues the Commission.<sup>41</sup> The new interpretation of distance contract will increase the level of protection in several national consumer laws<sup>42</sup>, whereas in Hungary, Slovakia and Latvia, for example<sup>43</sup>, consumers are already protected in contracts concluded at a distance for an occasional sale.

The compromise text amended the definition of the original proposal and added the requirement that the contract negotiation and also the conclusion of the contract must be carried out through the means of distance communication<sup>44, 45</sup>. IMCO did not support this change and, although it introduced some refinement in the wording of the definition, it maintained the original concept and did not accommodate this addendum.<sup>46</sup> Furthermore, IMCO insisted that it must be made clear that websites purely offering information on the trader, their goods and/or services should not be covered by the definition of such an organised distance sales or service-provision scheme, even if such websites indicate one or more means of distance communication.<sup>47</sup>

### The definition of off-premises contract

The original proposal widens the definition of **off-premises contract** as well. The protection of consumers in respect of off-premises contracts is designed to protect consumers against the risks arising from the conclusion of contracts away from the trader's<sup>48</sup> premises<sup>49</sup> and, second, that the protection of the consumer is assured by the introduction of a right of cancellation<sup>50, 51</sup>. According to the proposal, off-premises contract means any sales or service contract

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<sup>41</sup> See: CRD preamble 13.

<sup>42</sup> These countries are: Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, Estonia, Germany, Italy, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovenia, Spain, Sweden, Ireland, Greece, and the United Kingdom.

<sup>43</sup> Also in the Czech Republic, France, and Lithuania.

<sup>44</sup> It must be noted that both the compromise text and IMCO elaborated the definition of means of distance communication.

<sup>45</sup> Comp. Text. Art. 2. (6).

<sup>46</sup> The definition proposed by IMCO: 'distance contract' means any contract for the supply of a good or the provision of a service concluded between a trader and a consumer under an organised distance sales or service-provision scheme where the trader and the consumer are not simultaneously physically present for the conclusion of the contract, but, rather, make exclusive use of one or more means of distance communication;

<sup>47</sup> IMCO text preamble 12.

<sup>48</sup> It must be noted that, according to the case law, Directive 85/577 applies not only to synallagmatic contracts (*contractus bilaterales aequales*), but also to multilateral contracts. See: *Case C-215/08 E. Friz GmbH v Carsten von der Heyden*, not yet published in ECR, at para 51.

<sup>49</sup> As Advocate General Trstenjak put it in the opinion issued in *E. Friz GmbH*, „the purpose of consumer protection under Directive 85/577 is to protect consumers from hasty decisions which they may make away from a trader's business premises. Particular protection must be guaranteed for consumers in circumstances in which a contract is concluded at the initiative of the trader, the consumer being placed in a situation characterised by an element of surprise, since he is unable to compare the quality and price of the offer with those of other offers.” Opinion of Advocate General Trstenjak, *Case C-215/08 E. Friz GmbH v Carsten von der Heyden*, at para 50.

<sup>50</sup> „Since a consumer runs the risk of making a hasty decision as regards the conclusion of a contract, he must have a period of time for reflection after the contract has been concluded to consider the obligations arising from the contract and to decide whether or not to cancel that contract, in accordance with Article 5(1) of Directive 85/577, within a period of not less than seven days.” see: Opinion of Advocate General Trstenjak, *Case C-215/08 E. Friz GmbH v Carsten von der Heyden*, at para 50.

<sup>51</sup> *Case C-481/99 Georg Heiningер & Helga Heiningер v Bayerische Hypo- und Vereinsbank AG*. ECR 2001. I-09945, at para 38, *Case C-350/03 Elisabeth Schulte and Wolfgang Schulte v Deutsche Bausparkasse Badenia AG*, ECR 2005 Page I-09215, at para 66.



concluded away from business premises with the simultaneous physical presence of the trader and the consumer or any sales or service contract for which an offer was made by the consumer in the same circumstances, or any sales or service contract concluded on business premises but negotiated away from business premises, with the simultaneous physical presence of the trader and the consumer.<sup>52</sup> This new definition – contrary to the current definition<sup>53</sup> - includes contracts resulting from solicited visits as well.<sup>54</sup> However, in certain countries, such as France, Italy, Latvia, Luxembourg, United Kingdom and Poland, consumers already enjoy protection for all types of solicited visits.<sup>55</sup> In other Member States the level of protection is very fragmented, since the protection of consumers depends upon certain special conditions varying by type of solicited visit. Under the concept of the proposal, a contract negotiated at the consumer's home but concluded in a shop should also be regarded as an off-premises contract.<sup>56</sup> Furthermore, the original proposal does not introduce any monetary threshold regarding off-premises contracts.<sup>57</sup> Business premises<sup>58</sup> include premises in all forms which serve as a permanent place of business for the trader. Market stalls and fair stands are also to be regarded as business premises, even though they may be used by the trader on a temporary basis. The exclusion of contracts at fairs and markets from the definition of off-premises contracts is also a development in comparison to the current

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<sup>52</sup> Art. 2. 8.

<sup>53</sup> Article 1(1) of the direct selling directive provides that the directive is to apply to contracts concluded between a trader supplying goods and services and a consumer, either during an excursion organised by the trader away from his business premises or during a visit by him to the consumer's home or place of work, where the visit does not take place at the express request of the consumer. For the interpretation of this article see: *Case C-91/92 Paola Faccini Dori v Recreb Srl*. ECR 1994 I-03325. The concept of off-premises contract refers to premises in which the trader usually carries on his business and which are clearly identified as premises for sales to the public. A contract concluded in a situation in which a trader has invited a consumer to go in person to a specified place at a certain distance from the place where the consumer lives, and which is different from the premises where the trader usually carries on his business and is not clearly identified as premises for sales to the public, in order to present to him the products and services he is offering, must therefore be considered to have been concluded during an excursion organised by the trader away from his business premises within the meaning of Directive 85/577. See: *Case C-423/97 Travel Vac SL v Manuel José Antelm Sanchis* ECR 1999. I-02195, paras 37 – 38. Article 3 of the Directive exhaustively lists a number of types of contract to which the directive does not apply, but these derogations must be interpreted strictly. See: *Case C-481/99 Georg Heininger & Helga Heininger v Bayerische Hypo- und Vereinsbank AG*. ECR 2001. I-09945, paras 28 and 31.

<sup>54</sup> During the negotiations Austria has several times emphasized that the broad definition of "off-premises contracts" raises major concerns among traders, since it does not take into account whether the consumer or the trader has established the business contact. Malta also has strong concerns on the wide definition of off-premises contracts. According to Malta, the definition should only include unsolicited visits. Some services require on-site visits by their very nature and it is very common that the contract is concluded or that negotiations are done on site.

<sup>55</sup> See: Annex to the Impact Assessment Report page 58.

<sup>56</sup> CRD preamble 14.

<sup>57</sup> A monetary threshold in this regard would mean that, if the value of the contract is below the monetary threshold, consumers are not protected by the rules. In accordance with Article 3 (1) of the current directive, Member States may decide that the Directive shall apply only to contracts for which the payment to be made by the consumer exceeds a specified amount. This amount may not exceed 60 ECU. The Council, acting on a proposal from the Commission, can examine and, if necessary, revise this amount ... taking into account economic and monetary developments in the Community. Based on this possibility, several countries introduced such a monetary threshold: Austria (€15 or €45), Bulgaria (€61), Estonia (€15), Lithuania (€58), Malta (€47), the Netherlands (€34), Poland (€10), Portugal (€60 but not applicable to the withdrawal right), Finland (€15), Germany (€40), Ireland (€51), Italy (€26), Romania (€30), Slovenia (€12), Spain (€48), Sweden (€32), United Kingdom (€51)

<sup>58</sup> Article 2 (9) 'business premises' means: (a) any immovable or movable retail premises, including seasonal retail premises, where the trader carries on his activity on a permanent basis, or (b) market stalls and fair stands where the trader carries on his activity on a regular or temporary basis;

regime. Although in the majority of member states<sup>59</sup> consumers are not protected when buying at fairs or markets under the present status quo, some member states do maintain a protection system for these consumer transactions.<sup>60</sup> However, premises rented for a short time and where the trader is not established, public spaces including public transport or facilities, private homes and workplaces cannot be regarded as business premises.<sup>61</sup>

The compromise text changes this definition and introduces a new concept for off-premises contracts. According to this new concept, an off-premises contract can be concluded in three different ways. The first option is that the contract is concluded in the simultaneous physical presence of the trader, or anyone acting in the name and on behalf of the trader, and the consumer, in a place which is not the business premises of the trader or for which an offer was made by the consumer in the same circumstances. The second option is when the contract is concluded either on the business premises of the trader or through any means of distance communication but immediately after the consumer was personally and individually addressed in a place which is not the business premises of the trader in the simultaneous physical presence of the trader, or of anyone acting in the name and on behalf of the trader, and the consumer. This means that the decision to conclude a contract is made after the first contact between the trader and consumer. It is important to note that in this case the contract can be concluded even through the means of distance communications. Finally, according to the third option, a contract qualifies as an off-premises contract if concluded during an excursion organised by the trader, or anyone acting in the name and on behalf of the trader, with the aim or effect of promoting and selling goods or services to the consumer.<sup>62</sup> Furthermore, the new text also completed the definition of business premises, through restructuring and rewording the Commission text. Article 2. paragraph 9 is divided in two points. Point a) deals with immovable retail premises, while point b) with movable premises. Under point a) “business premises” mean any immovable retail premises where the trader carries on his activity on a permanent basis. Regarding movable business premises – covered by point b) – the requirement is that the trader must carry on his business activity on these retail premises on a customary basis. Retail premises where the trader carries out his activity on a seasonal basis (for instance during the tourist season at a ski or beach resort), should be treated as business premises as the trader carries on his activity on a customary basis.<sup>63</sup> IMCO further clarified the three-tier concept of off-premises contract. The most important changes were made to the second and third options. Regarding the first one, IMCO elaborated the part of the definition that referred to the means of conclusion of the contract after and on the basis of the simultaneous physical presence of the parties. The proposed modification requires only that the offer must be made by the consumer with the simultaneous physical presence of the trader and the consumer away from business premises. As far as contracts concluded on the occasion of an excursion are concerned, IMCO again clarified and detailed the requirements.<sup>64</sup> A further development in comparison to the original text is that IMCO

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<sup>59</sup> These countries are: Austria, Czech Republic, Hungary, Netherlands, Spain, Bulgaria, Cyprus, Estonia, Germany, Greece, Ireland, Portugal, Romania, Slovakia, Sweden, Denmark, Finland, Lithuania, Malta, France, Italy, Luxembourg, United Kingdom and Poland.

<sup>60</sup> In Latvia, Slovenia and Belgium consumers are protected for contracts concluded at fairs. As regards Belgium, consumers are protected only for sales where no full payment is made at the fair and the value exceeds €200.

<sup>61</sup> CRD preamble 15.

<sup>62</sup> Comp. Text Art. 2. 8.

<sup>63</sup> See: Comp. Text preamble 15.

<sup>64</sup> „whose main components have been determined in the course of an excursion, a leisure event or a sales demonstration organised by the trader or by a third party on behalf of the trader away from business premises, with the simultaneous physical presence of the trader and the consumer, the aim of such excursion, leisure event or demonstration being to conclude a contract subsequently on business premises” Art. 2 8. b).

introduces a monetary threshold requirement. This means, that the contracts under which the payment to be made by the consumer does not exceed EUR 40 are not covered by the directive. However, it is important that the Member States have the freedom to set a lower threshold.<sup>65</sup> Finally, “fair stands” got eliminated from the concept of business premises.<sup>66</sup>

### **The auction problem**

Beside the above concepts, in order to meet the new market developments and business methods – that is to eliminate the use of paper during the contracting and transaction phase – the proposal regulates auctions and public auctions and applies the concept of durable medium to enable businesses and consumers to exchange paper-based communication for the opportunities offered by the development of technology.

The proposal defines auction as a method of sale where goods or services are offered by the trader through a competitive bidding procedure, which may include the use of means of distance communication, and where the highest bidder is bound to purchase the goods or the services. A transaction concluded on the basis of a fixed-price offer, despite the option given to the consumer to conclude it through a bidding procedure is not an auction.<sup>67</sup> The definition of auction is important since Article 19 (1) of the proposal provides for an exception from the applicability of the right of withdrawal. According to this exception, the right of withdrawal does not apply to contracts concluded through auction. It is also very important, since up until this definition there was no definition for auction at all, despite the fact that, for example, the Rome I Regulation also uses this term<sup>68</sup>. The Directive also refers to this concept, when it excludes auctions from its scope, but without giving a definition.<sup>69</sup> It was left to national laws to fill this gap. National lawmakers were also very reluctant to provide a general definition of auction, and also national concepts differ from state to state.<sup>70</sup> The problem arose when Member States started to apply the auction exception to online auction sites. The Commission, in its communication on the implementation of the Directive, therefore noted that there is a need to settle this issue at Community level.<sup>71</sup> The difference between auction and public auction is that whereas an auction can be organised at a distance, public auctions require the physical presence of the bidder and the auctioneer. Under Article 2. 16, public auction means a method of sale where goods are offered by the trader to consumers, who attend or are given the possibility to attend the auction in person, through a competitive

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<sup>65</sup> IMCO text preamble 14.

<sup>66</sup> See: IMCO text Art. 2. 9. b)

<sup>67</sup> Art. 2. 15.

<sup>68</sup> Art. 4. 1. g.

<sup>69</sup> Article 3 Exemptions, 1. This Directive shall not apply to contracts: - concluded at an auction.

<sup>70</sup> See e.g. Peer Zumbansen, Contracting in the Internet: German Contract Law and Internet Auctions, 2 German Law Journal (2001), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=65>

<sup>71</sup> „The increase in popularity of on-line auctions since the adoption of the Directive has led to a significant rise in consumer complaints. Whereas originally websites such as eBay were geared towards C2C transactions of second hand goods, they are increasingly being used for B2C transactions of new goods. The Commission is aware of national case law on whether websites such as eBay amount to auction houses and are therefore exempted from the Directive. The transposition checks have confirmed the need to look at the meaning of “auction” in national laws. In France, for instance, the exemption has been limited to “public” auctions; in Denmark the exemption applies to auctions organised in such a way that a large proportion of the bidders are normally present at the place of the auction. Some Member States also appear to have only partially transposed the exemption (e.g. in Estonia, the exemption for auctions is limited to the non application of the right of withdrawal).” see Communication from the Commission to the Council and the European Parliament on the implementation of Directive 97/7/EC on the Protection of Consumers in respect of Distance Contracts, COM(2006) 514 final, page 8.

bidding procedure run by an auctioneer and where the highest bidder is bound to purchase the goods. This proposed new regime has already received criticism that is centred around the fear that the exclusion of online auctions from the protection accorded by the right of withdrawal may lead to the erosion of consumer rights.<sup>72</sup> Moreover, the definition of an auction refers to both goods and services, whilst that of a public auction only mentions goods. This difference might lead to a conclusion that public auctions cannot concern services.<sup>73</sup>

The compromise text, while elaborating the concept of “auction”<sup>74</sup>, maintained the original definition of the proposal regarding the term “public auction”. The only amendment proposed by the presidency was the change of the combination of words “highest bidder” to “successful bidder”. This is because there are auction methods where it is not the highest bidder who can conclude the contract at the end. Based on the text, a public auction implies that traders and consumers attend or are given the possibility to attend the auction in person. The goods or services are offered by the trader to consumers through a bidding procedure, run by a third person, authorised by law in some Member States, to sell the goods of others at public sale, known as an auctioneer. The successful bidder is bound to purchase the goods or services. On the contrary, an auction does not imply that the trader and the consumer are present: a mean of distance communication can be used. The use of on-line platforms for auction purposes at the disposal of consumers and traders is not considered as a public auction within the meaning of the Directive.<sup>75</sup>

IMCO felt that the definition was not concrete enough and inserted an explanatory addendum. According to the IMCO proposal, “public auction” means a method of sale where a good or a service is offered by the trader to consumers, during an event which is physically accessible to the public, through a transparent, competitive bidding procedure run by a third party (the auctioneer), who, for pecuniary consideration, acts as the trader's agent. In an ascending price auction, the good or service is sold to the consumer or a person acting on his behalf making the highest bid. In a descending price auction, the good or service is sold to the consumer or a person acting on his behalf who is first to agree immediately to purchase the good or service for the asking price. This new definition might be capable of covering the present business methods for conducting auctions.

## **The issue of the level of harmonisation**

The Green paper in 2007 already proposed full harmonisation<sup>76</sup> as a possible measure to eliminate the fragmentation of the national consumer legislation.<sup>77</sup> According to the Green

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<sup>72</sup> For an argument regarding the need for extending the right of withdrawal (even in a limited manner) to online auction see e.g. Christine Riefa, A Dangerous Erosion of Consumer Rights: The Absence of a Right to Withdraw from Online Auctions, in *Modernizing and Harmonizing Consumer Contract Law*, in Geraint Howells and Reiner Schultze, eds., Sellier European Law Publishers (2009), pp. 177-188. also available at <http://ssrn.com/abstract=1374063>

<sup>73</sup> Dr Christine Riefa, Recommended changes to the definitions of “Auction” and “Public Auction” in the Proposal for a Directive on Consumer Rights, p 15, available at <http://ssrn.com/abstract=1679677>

<sup>74</sup> This is because the text also changed Article 19 in relation to the exceptions to the right of withdrawal. The exception now applies to public auctions and not to auctions. See: Article 19. 1. h) point.

<sup>75</sup> See: Comp. Text preamble 16a

<sup>76</sup> „[F]ull harmonisation [means] maximum approximation of the national laws and regulations, which bars Member States, ... from retaining or introducing more stringent provisions.” see: Opinion of Advocate General Trstenjak delivered on 21 October 2008 in *Joined Cases C-261/07 and C-299/07 VTB-VAB NV v Total Belgium NV and Galatea BVBA v Sanoma Magazines Belgium NV*, p 74.

<sup>77</sup> Since the aim is to eliminate the legal fragmentation, a reasonable question would be whether adopting a regulation on the subject would be more effective. On the issue whether a regulation or a directive is the better

paper, full harmonisation would not only entail the repeal of the minimum harmonisation clauses but it would also imply the elimination of the regulatory options available to Member States on specific aspects by some provisions in the directives, which can result in modifying the level of consumer protection in some Member States. However, it was already foreseen in 2007 that full harmonisation might not be achieved in all aspects of consumer contract law, therefore the Green paper proposed another option as well, where on a case-by-case basis the harmonisation approach can be complemented by a clause providing for mutual recognition for certain aspects covered by the proposed legislation but not fully harmonised.<sup>78</sup> However, as the Green paper continues, this latter option would not simplify and rationalise the regulatory environment.<sup>79</sup> The majority of respondents to the Green Paper called for the adoption of a horizontal legislative instrument based on full targeted harmonisation.<sup>80</sup>

The original 2008 proposal moved away from the minimum harmonisation approach<sup>81</sup> followed in the four existing directives to embrace a full harmonisation approach<sup>82</sup>. Article 4 of the proposal introduces the full harmonisation principle, according to which Member States may not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive. This restriction includes both more and less stringent provisions, even if their aim is to ensure a different – higher - level of consumer protection.

In the field of consumer law, the UCP directive introduced the full harmonisation principle<sup>83</sup>, “[b]ecause the impact of fragmented regulation is so significant, it is necessary to tackle these

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legislative instrument see: Christian Twigg-Flesner and Daniel Metcalfe: The proposed Consumer Rights Directive – less haste, more thought?, at pages 4-5.

<sup>78</sup> The third possible option was minimum harmonisation eventually combined with the country of origin approach.

<sup>79</sup> see Green Paper on the Review of the Consumer Acquis, COM(2006) 744 final, page 11.

<sup>80</sup> „[T]he largest group within the business sector indicated preferring full harmonisation (42%) (almost 80% of the business sector favoured full or targeted full harmonisation), the largest group within the consumer groups favoured the minimum harmonisation approach (31%). Businesses preferred full harmonisation ... Consumers mentioned preferring minimum harmonisation since this approach allows Member States to go beyond the minimum standards. ... [F]or both stakeholder groups the opinions were divided within the group itself. For both consumer groups and the business sector the second largest group of contributors favoured targeted full harmonisation (29% and 37% respectively). The group of academics, legal practitioners and public authorities favoured minimum harmonisation. However, an equally large proportion of contributors within the group of legal practitioners and public authorities respectively favoured targeted full harmonisation (i.e. 39%) and other options (i.e. 26%). Five out of seven contributors of the “others” group favoured the minimum harmonisation approach. Regarding Member States contributions, targeted full harmonisation was the option supported by the largest group (12). Five Member States supported option 3 “full harmonisation” whereas four Member States supported option 1 “minimum harmonisation”. Four Member States opted for ‘other options’ and one EFTA/EEA country did not respond.” see: Preparatory Work for the Impact Assessment on the Review of the Consumer Acquis/GP Analytical Report, Analytical Report on the Green Paper on the Review of the Consumer Acquis submitted by the Consumer Policy Evaluation Consortium, 06/11 /2007, pp. 48-49.

<sup>81</sup> In the case of minimum harmonisation, Member States may maintain or adopt stricter national rules than those laid down in the Directive.

<sup>82</sup> The meaning of full harmonisation is that Member States cannot maintain or adopt provisions diverging from those laid down in the Directive.

<sup>83</sup> The deadline for transposition was 12 June 2007. It must be noted, that several Member States were late in transposing the Directive into their national laws, which led the Commission to initiate infringement proceedings against several Member States. This fact however highlights one possible way to circumvent directives. Member States are often reluctant to fulfil the implementation obligation when they believe that the rules provided for in the given instrument are not fully acceptable to them. A good example for this is Directive 2004/38. According to the Report published by the Commission in 2008 on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [COM/2008/0840 final], not one Member State has transposed the Directive

barriers with action at EU level.”<sup>84</sup> Regarding consumer contract law, the Commission noted that the laws of the Member States on consumer contracts show marked differences which can generate appreciable distortions of competition and obstacles to the smooth functioning of the internal market. The current European legislation in the field of consumer contracts, consumer goods and guarantees and unfair contract terms establishes minimum standards for harmonising legislation allowing the Member States the possibility to maintain or introduce more stringent measures which ensure a higher level of consumer protection in their territories. Furthermore, many issues are regulated inconsistently between directives or have been left open. These issues have been addressed differently by the Member States. As a result, the national provisions implementing directives on consumer contract law diverge significantly.<sup>85</sup> As the Commission argues, these disparities create significant internal market barriers affecting business and consumers. They increase compliance costs to business wishing to engage in cross border sale of goods or provision of services. Fragmentation also undermines consumer confidence in the internal market.<sup>86</sup> The negative effect on consumer confidence is strengthened by an uneven level of consumer protection across the Community. This problem is particularly acute in the light of new market developments.<sup>87</sup> Based on these reasonings, the Commission believes that full harmonisation of some key regulatory aspects can considerably increase legal certainty for both consumers and business. Both consumers and business can rely on a single regulatory framework based on clearly defined legal concepts regulating certain aspects of business-to-consumer contracts across the Community. The effect will be to eliminate the barriers stemming from the fragmentation of the rules and to complete the internal market in this area. These barriers can only be eliminated by establishing uniform rules at Community level. Furthermore consumers will enjoy a high common level of protection across the Community.<sup>88</sup>

The full harmonisation approach received strong criticism from all interested parties, including Member States, consumer and business groups<sup>89</sup>, and also institutions of the European Union. Although by its very nature full harmonisation could be a good measure to end legal fragmentation and create a coherent, unified set of rules all over the Member States,

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effectively and correctly in its entirety. Not one Article of the Directive has been transposed effectively and correctly by all Member States.

<sup>84</sup> Proposal for a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive){SEC (2003) 724} COM/2003/0356 final - COD 2003/0134, para 25.

<sup>85</sup> CRD Preamble 6.

<sup>86</sup> At this point regard has to be made of a survey in which consumers who felt less confident buying from another EU country than in their own country were asked why. Sixty-eight percent of those consumers cited lower standards of consumer protection laws as a very or fairly important reason for their lack of confidence while 76% cited a lack of trust in foreign sellers and a perceived greater risk of fraud or deception as a very or fairly important factor. For consumers, the uncertainty of not knowing what consumer protection is provided by other EU countries' laws was also a bigger barrier to cross-border shopping - with 79% of respondents citing it as a very or fairly important obstacle - than their perception that the standards of protection were lower in other countries. See: Proposal for a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive){SEC (2003) 724} COM/2003/0356 final - COD 2003/0134, paras 15 and 18.

<sup>87</sup> CRD Preamble 7.

<sup>88</sup> CRD Preamble 8.

<sup>89</sup> „Consumer groups have been extremely critical of the fact that it would impose maximum standards on member states, and so undercut existing consumer rights in certain countries, such as the UK, which are already more generous.” Nikki Tait, 'Consumer rights directive' for EU, in Financial Times, February 25, 2010, available at <http://www.ft.com/cms/s/0/9596bc4a-2175-11df-830e-00144feab49a.html#ixzz1DgNpO7FW>

it turned out not to be working in this case. The problem is that in the area of consumer contract law there was a very massive block of national contract laws which, due to the minimum harmonisation principle, in some instances provided for a stronger, higher level of consumer protection than the average.<sup>90</sup>

CofR noted that several countries have made wide use of the possibility provided for by the minimum harmonisation directives and introduced national legislation setting higher levels of consumer protection than required by the directives. It therefore rejected the principle of full harmonisation on a broad scale, as Member States may thereby have to sacrifice particular consumer protection provisions in the name of standardisation, even where these have proved effective in the country concerned.<sup>91</sup> Furthermore, CofR argued that the principle of minimum harmonisation should in essence be retained. Member States must, as a matter of principle, retain the flexibility to adapt consumer law to their own national legal system by mandating higher levels of protection. It believes that this new direction in EU consumer law is therefore not strictly necessary.<sup>92</sup> Full harmonisation should be considered selectively, i.e. in specific technical cases only, where the different national provisions in place up to now are genuinely and demonstrably placing a burden on cross-border businesses or represent a substantial obstacle to achieving the four freedoms of the European Union. Moreover, CofR also questioned the compatibility of maximum harmonisation with the principle of subsidiarity. According to CofR, the Commission's reasoning was not convincing enough in this regard either. The same concern was raised regarding whether full harmonisation is really capable of boosting consumer confidence. The lack of confidence among the consumers is the consequence of the uncertainties and complexities of law enforcement in cross-border trade (language barriers, legal fees, courts costs, etc.) rather than the different level of consumer protection rules. Finally, CofR notes that the harmonised rules must be backed by understandable and empirical reasoning and subject to a realistic impact assessment.<sup>93</sup> On this last point, CofR questions the robustness of the Eurobarometer survey used by the Commission to justify the provisions of the proposal.<sup>94</sup>

During the Council Working Party meetings it became clear that the original full harmonisation approach cannot be maintained if the purpose is the adoption of a directive. In order to reach progress and compromise, the Belgian presidency proposed a shift from full harmonisation to differentiated, targeted harmonisation. The compromise text in the new Article 4, under the title “[l]evel of harmonisation”<sup>95</sup>, declares that Member States may not

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<sup>90</sup> The full harmonisation principle could be a good solution in the UCP directive, since that regulated a field of law that ...

<sup>91</sup> CofR in point 13 of the opinion notes that „[a]t any event, there is no evidence that different domestic rules are an obstacle to cross-border trade”.

<sup>92</sup> For an analysis on how the minimum harmonisation can affect the functioning of the internal market, and through the analysis of the Gysbrechts case, in particular whether the minimum harmonisation can create an obstacle to the free movement of goods based on the fact that in certain instances it can lead to the violation of the principle of proportionality see: Susanne Gschwandtner: National Private Law Rules as Restrictions to Market Freedoms in S. Gschwandtner, V. Kosta, H. Schebesta and P. Verbruggen: The Impact of the Internal Market on Private Law of Member Countries, EUI Working Papers, LAW 2009/22, pp. 31 – 53, at 31 – 44 and 48 – 52.

<sup>93</sup> Regarding the impact assessment study see: Willem H. van Boom: The Draft Directive on Consumer Rights: Choices Made and Arguments Used, Journal of Contemporary European Research. Volume 5, Issue 3, pp. 452-464, at 461 – 464, Available at: <http://www.jcer.net/ojs/index.php/jcer/article/view/208/169>

<sup>94</sup> See: CofR Opinion p. 11 – 15. Regarding the last point, CofR emphasized that the Commission must provide empirical and coherent reasons as to why action needs to be taken on the individual provisions. The impact assessment attached to the proposal merely gives an abstract indication of the effects of various different options for action.

<sup>95</sup> Note, that in the original proposal the respective article was titled „Full harmonisation”. See: Art. 4.

maintain or introduce, in their national law, provisions diverging from those laid down in the directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided in this directive. IMCO further detailed this provision of the proposal. The text proposed by IMCO regulates this issue at two levels. First, it declares a general rule, and second, through two sets of exceptions, details the possibilities for divergence from the directive. Article 4<sup>96</sup> paragraph 1 states the general rule by declaring that, except where provided for in paragraph 1(a) and 1(b) of Article 4, Member States may *maintain or introduce*, in their national law, more stringent provisions, compatible with the Treaty on the Functioning of the European Union, in order to ensure a higher level of consumer protection, under the conditions and to the extent specified in Article 5<sup>97</sup>, Article 9(3b)<sup>98</sup> and 9(3c)<sup>99</sup>, Articles 22 to 29<sup>100</sup>, Article 31(4)<sup>101</sup> and Articles 34<sup>102</sup> and 35<sup>103</sup>. Paragraph 1 (a) allows Member States *to maintain in force*, in their national law, more stringent provisions, which are compatible with the Treaty on the Functioning of the European Union, in order to ensure a higher level of consumer protection, as laid down in Articles 12(4)<sup>104</sup> and Article 13(2)<sup>105</sup>. Finally, paragraph (b) – based on full harmonisation – provides that Member States *may not maintain or introduce*, in their national law, provisions diverging from those laid down in Article 2<sup>106</sup>, Article 9(1) to (3a) and Article 9(3e)<sup>107</sup>, Articles 10<sup>108</sup> and 11<sup>109</sup>, Article 12(1) to (3)<sup>110</sup>, Article 13(1)<sup>111</sup>, Articles 14 to 19<sup>112</sup>, Articles

<sup>96</sup> Titled „degree of harmonisation”.

<sup>97</sup> Information requirement for on-premises contracts

<sup>98</sup> This provision deals with pre-contractual information requirements. It declares that, for distance and off premises contracts relating to transport services or health and safety requirements, Member States may adopt or maintain provisions of national law laying down additional pre-contractual information requirements, provided that they are compatible with the Treaty on the Functioning of European Union and that such requirements are appropriate for the proper information of the consumer.

<sup>99</sup> It states that Member States may adopt or maintain additional pre-contractual information requirements for all distance and off-premises contracts for the provision of services for which, pursuant to Article 22(5) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market<sup>19</sup>, they impose additional information requirements applicable to providers established in their territory.

<sup>100</sup> These provisions deal with other consumer rights and remedies, including the issues of delivery, means of payment, passing of risk, duration of the contract, conformity with the contract, liability and remedies for lack of conformity, right of recourse, time limits, burden of proof and commercial guarantees.

<sup>101</sup> In connection with contract terms, Article 31 (4) provides that Member States shall refrain from imposing any requirements on the presentation of contract terms, except for presentational requirements in relation to persons with disabilities, or where the goods or services may present a particular risk to the health and safety of the consumer or a third person, or in respect of specific goods or services where there is evidence that demonstrates consumer detriment.

<sup>102</sup> Article 34 refers to the so-called black list regarding contract terms. Article 34 paragraph 2 applies the minimum harmonisation method (“Member States may provide in their national legislation for additional contract terms considered unfair in all circumstances”).

<sup>103</sup> As the counterpart of Article 34, Article 35 regulates the terms that presumed to be unfair. These are the so-called grey list terms. The approach is similar, in that it works with the minimum harmonisation principle and allows member states to introduce national legislation that covers additional contract terms presumed to be unfair.

<sup>104</sup> Article 12 (4): The Member States shall not prohibit the parties from performing their contractual obligations during the withdrawal period. Nevertheless, in the case of off-premises contracts, Member States may maintain existing national legislation prohibiting the trader from collecting the payment during a given period after the conclusion of the contract.

<sup>105</sup> There is no Article 13 (2) in the IMCO text. However, there is a (1a) paragraph that provides that the Member States may maintain existing national legislation providing for a longer period of expiration of the withdrawal period.

<sup>106</sup> Definitions

<sup>107</sup> Pre-contractual information requirements for distance and off-premises contracts

<sup>108</sup> Formal pre-contractual information requirements for off-premises contracts

<sup>109</sup> Formal pre-contractual information requirements for distance contracts



30 to 33<sup>113</sup> and Articles 36, 37 and 38<sup>114</sup>, including more or less stringent provisions to ensure a different level of consumer protection.

### Information requirements – or right of information

As the impact assessment study has showed, one of the main problematic issues was related to consumer information. Beside the consumer directives, there are already rules under EU law that contain information requirements. One of them, and maybe the most appropriate, is the E-commerce Directive<sup>115</sup>. The E-commerce Directive is not only a consumer protection directive but is applicable to business-to-consumer relations as well.<sup>116</sup> The Directive regulates the information requirements on two levels. The first level contains the general information requirements<sup>117</sup>, while the second level regulates the pre-contractual information requirements<sup>118</sup>. The Services Directive<sup>119</sup> also contains rules regarding information,

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<sup>110</sup> Length and starting point of the withdrawal period

<sup>111</sup> Omission of information on the right of withdrawal

<sup>112</sup> Exercise of the right of withdrawal, Effects of withdrawal, Obligations of the trader in case of withdrawal, Obligations of the consumer in case of withdrawal, Effects of the exercise of the right of withdrawal on linked contracts, Exceptions from the right of withdrawal.

<sup>113</sup> Scope of the provisions on unfair contract terms, Transparency requirements of contract terms, General principles (regarding unfair contract terms), Burden of proof.

<sup>114</sup> Interpretation of (unfair) terms, Effects of unfair contract terms, Enforcement in relation to unfair contract terms

<sup>115</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ L 178, 17.7.2000, p. 1–16

<sup>116</sup> In fact, one of the main purposes of the E-commerce Directive is to enhance consumer confidence: "In order to ensure legal certainty and consumer confidence, this Directive must lay down a clear and general framework to cover certain legal aspects of electronic commerce in the internal market." Preamble (7)

<sup>117</sup> Article 5 of the directive deals with the general information to be provided by any information service provider. 1. In addition to other information requirements established by Community law, Member States shall ensure that the service provider shall render easily, directly and permanently accessible to the recipients of the service and competent authorities, at least the following information: (a) the name of the service provider; (b) the geographic address at which the service provider is established; (c) the details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner; (d) where the service provider is registered in a trade or similar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that register; (e) where the activity is subject to an authorization scheme, the particulars of the relevant supervisory authority; (f) as concerns the regulated professions: - any professional body or similar institution with which the service provider is registered, - the professional title and the Member State where it has been granted, - a reference to the applicable professional rules in the Member State of establishment and the means to access them; (g) where the service provider undertakes an activity that is subject to VAT, the identification number referred to in Article 22(1) of the sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment. 2. In addition to other information requirements established by Community law, Member States shall at least ensure that, where information society services refer to prices, these are to be indicated clearly and unambiguously and, in particular, must indicate whether they are inclusive of tax and delivery costs.

<sup>118</sup> Article 10 contains the information to be provided before the order is placed by the recipient of the services: 1. In addition to other information requirements established by Community law, Member States shall ensure, except when otherwise agreed by parties who are not consumers, that at least the following information is given by the service provider clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service: (a) the different technical steps to follow to conclude the contract; (b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible; (c) the technical means for identifying and correcting input errors prior to the placing of the order; (d) the languages offered for the conclusion of the contract. 2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider indicates any relevant codes of conduct to which he subscribes and information on how those codes can be consulted electronically. 3. Contract terms and general conditions

including consumer information.<sup>120</sup> The consumer protection directives also contain information requirements, both in general and for the pre-contractual phase.

### **The general information requirements in the proposal**

The provisions on the information requirement of the proposal include rules regarding both the content of the information and the manner in which the information is provided. Chapter II of the original proposal dealt with the issue of consumer information. Article 5 contains the general information requirements. These rules are applicable to on-premises, off-premises and distance selling contracts. After taking a look at the proposal it can be noticed that the list provided in the original proposal does not really differ from the information requirements of the Distance Selling and Doorstep Selling Directives.

The traders must disclose certain information to the consumers before the conclusion of the contract. Therefore, according to the original proposal, prior to the conclusion of any sales or service contract, the trader must provide the consumer with a huge palm of information. However, traders do not have to provide the information when that is already apparent from the context. What does this mean? For example, in an on-premises transaction, the main characteristics of a product, the identity of the trader and the arrangements for delivery may be apparent from the context. However, in the case of distance and off-premises transactions, in most of the cases the traders should provide information on arrangements for payment, delivery, performance and its complaint handling policy, since these might not be apparent from the context.

First, the trader must inform the consumer of the main characteristics of the product.<sup>121</sup> The information requirements must be adapted to take into account the technical constraints of certain media, such as the restrictions of the number of characters on certain mobile telephone screens or the time constraint on television sales spots. As such, the proposal limits this information requirement to an extent appropriate to the medium used and the underlying product. If, due to the technological limits, the trader cannot supply all the information through the given platform, the trader must comply with a minimum set of information requirements and refer the consumer to another source of information, for instance by providing a toll free telephone number or a hypertext link to a homepage of the trader where the relevant information is directly available and easily accessible.

Second, the trader must disclose their own geographical address and identity, such as their trading name and, where applicable, the geographical address and the identity of the trader on whose behalf they are acting. In the case of public auctions, due to the nature and tradition of

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provided to the recipient must be made available in a way that allows him to store and reproduce them. 4. Paragraphs 1 and 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

<sup>119</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, p. 36–68

<sup>120</sup> For an analysis on the relationship between the proposal, the Services and E-Commerce Directives and other Community legislation see: THE PROPOSAL FOR A DIRECTIVE ON CONSUMER RIGHTS: SCOPE, RELATIONSHIP WITH NATIONAL GENERAL CONTRACT LAW AND RELATIONSHIP WITH OTHER COMMUNITY LEGISLATION, Note from the Commission, October 9, 2009.

<sup>121</sup> On the issue of disclosure about the quality of the products see: Christian Twigg-Flesner: Information Disclosure about the quality of goods – duty or encouragement? in Howells, G., Janssen, A., and Schulze, R. (eds.), Information rights and obligations: a challenge for party autonomy and transactional fairness (Aldershot: Ashgate, 2004). also available at <http://ssrn.com/abstract=1345009>

that sales method, the auctioneer may give their own contact details instead of communicating the geographical address and the identity of the seller for whom they are selling the goods.

Third, the trader must communicate the price, inclusive of taxes, or where the nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable.<sup>122</sup> If the trader does not comply with this information requirement, the consumer does not have to pay these additional charges.<sup>123</sup> Moreover, beside the fact that traders are obliged to inform consumers in advance of the arrangement for payment, they must also disclose if this arrangement results in the consumers paying a deposit to the trader, including an arrangement whereby an amount is blocked on the consumers' credit or debit card, which is typical in an internet commerce situation.

Finally, the trader must inform the consumer of the arrangements for delivery and performance and its complaint handling policy, if they depart from the requirements of professional diligence<sup>124</sup>; the existence of a right of withdrawal, where applicable<sup>125</sup>; the existence and the conditions of after-sales services and commercial guarantees, where applicable<sup>126</sup>; the duration of the contract where applicable or, if the contract is open-ended, the conditions for terminating the contract<sup>127</sup>; the minimum duration of the consumer's obligations under the contract, where applicable<sup>128</sup>; and the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader.<sup>129</sup>

This information forms an integral part of the sales or service contract.<sup>130</sup> The proposal does not regulate the consequences of the breach of any of the information requirements; it leaves this to the applicable national laws. It is therefore the Member States' obligation to provide effective contract law remedies for this kind of breach in their national laws.<sup>131</sup>

The proposal also contains specific information requirements for intermediaries. This is because it is essential that the consumer shall know whether he/she is contracting with the trader or with an intermediary acting on behalf of another consumer. In the latter case, the consumer does not enjoy protection under this directive. The intermediary must therefore inform the consumer of this fact and the consequences thereof.<sup>132</sup> If the intermediary fails to disclose this information, the assumption is that he concludes the contract in his own name.<sup>133</sup> The notion of intermediary does not include online trading platforms and public auctions which do not conclude the contract in the name of or on behalf of any other party.<sup>134</sup>

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<sup>122</sup> Art. 5. 1. c.

<sup>123</sup> Art. 6.1.

<sup>124</sup> Art. 5. 1. d.

<sup>125</sup> Art. 5. 1. e.

<sup>126</sup> Art. 5. 1. f.

<sup>127</sup> Art. 5. 1. g.

<sup>128</sup> Art. 5. 1. h.

<sup>129</sup> Art. 5. 1. i.

<sup>130</sup> Art. 5.3.

<sup>131</sup> Art. 6.2-3.

<sup>132</sup> Art. 7. 1.: „prior to the conclusion of the contract, the intermediary shall disclose to the consumer, that he is acting in the name of or on behalf of another consumer and that the contract concluded shall not be regarded as a contract between the consumer and the trader but rather as a contract between two consumers and as such falling outside the scope of this Directive.”

<sup>133</sup> Art. 7. 2.

<sup>134</sup> Art. 7. 3.

The Belgian presidency eliminated these rules from the proposal. IMCO however maintained this element of general information, but for the sake of clarification changed the title from “general information requirement” to “information requirement for on-premises contracts”, making clear that these provisions are not applicable to off-premises and distance selling contracts. However, besides changing the title, IMCO proposed several significant amendments as well. At in the very beginning of the proposed text, it declares that information must be provided in a clear and intelligible manner, if not already apparent from the context. The time of the information requirement changed too, since the new text requires the provision of information not necessarily prior to the conclusion of the contract, but on the conclusion of the contract. In reality it means that the information is provided prior to the conclusion of the contract, since this relates to on-premises contracts, where both the trader and the consumer are simultaneously present and directly communicate to each other. Regarding the substance of the information to be provided, it must be mentioned that IMCO proposed changes to some aspects. One of these concerns the particulars of the trader. The newly incorporated paragraph (ba) requires the trader's business address, telephone number, fax number and e-mail address, where available, to enable the consumer to contact the trader quickly and to communicate with him effectively<sup>135</sup>. When providing the information, the trader must take into account the specific needs of consumers who are particularly vulnerable. Consumers can be particularly vulnerable, based on their mental, physical or psychological infirmity, age or credulity, in a way which the trader could reasonably be expected to foresee. However, taking into account these specific needs cannot lead to different levels of consumer protection.<sup>136</sup>

### **Specific information requirements for distance and off-premises contracts**

Whereas the previous rules of the original proposal apply to all kinds of consumer contracts, the proposal contains additional information requirements for distance and off-premises contracts.<sup>137</sup> Having noted this, it must also be pointed out that, based on the compromise text and the IMCO text, the general information requirements are either eliminated as a whole (compromise text) or are restricted to on-premises contracts only (IMCO). This means that, for distance and off-premises contracts, only the special rules are applicable. Article 9 deals with the issue of information requirements, Article 10 regulates the formal requirements for off-premises contacts, and Article 11 the formal requirements for distance contracts.

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<sup>135</sup> The issue of effective and direct communication was at stake in *Case C-298/07 Bundesverband der Verbraucherzentralen und Verbraucherverbände v deutsche internet versicherung AG*. Although the case concerned the application of Article 5 of the E-commerce Directive, the reasoning and finding of the Court are still worth considering regarding the proposed rules as well. AG Ruiz-Jarabo Colomer argued that “[e]ffective communication is achieved when the client receives a rapid response – not immediate, but prompt. ... ‘effective’ communication promotes real dialogue between the parties concerned, so that each question is followed by a flexible response with additional information, which does not always happen with telephone call-centre services since often calls are not dealt with by a person and the client concerned is confronted with a vocal menu from which he has to select the options most appropriate to the matter on which he seeks advice.” see: paras 30-31 of the Opinion. The Court did not fully accommodate this opinion. In its judgment the Court stated that “effective communication does not mean that the response given to a question posed must be instantaneous. On the contrary, a communication is to be regarded as effective if it permits adequate information to be obtained within a period compatible with the needs or legitimate expectations of the recipient.” see: para 30 of the Judgment. *Case C-298/07 Bundesverband der Verbraucherzentralen und Verbraucherverbände v deutsche internet versicherung AG*.

<sup>136</sup> IMCO text preamble (17)

<sup>137</sup> Chapter III.

The original Article 9 of the proposal contained specific information requirements for both distance and off-premises contracts. According to this provision, the trader must provide the information referred to in Articles 5 and 7 and, by way of derogation from Article 5(1)(d), the arrangements for payment, delivery and performance in all cases, the conditions and procedures for exercising the right of withdrawal, if different from his geographical address, the geographical address of the place of business of the trader (and where applicable that of the trader on whose behalf he is acting) where the consumer can address any complaints, the existence of codes of conduct and how they can be obtained, where applicable, the possibility of having recourse to an amicable dispute settlement, where applicable, and finally that the contract will be concluded with a trader and as a result that the consumer will benefit from the protection afforded by the Directive<sup>138</sup>. These data shall become parts of the contract.

With respect to off-premises contracts, the information must be provided in the order form in plain and intelligible language and must be legible. Furthermore, the order form must include the standard withdrawal form. The contract will only be valid if the consumer signs the order form and, in cases where the order form is not on paper, receives a copy of the order form on another durable medium.<sup>139</sup>

In the case of distance contracts, the same conditions apply, meaning that the information must be provided to the consumer prior to the conclusion of the contract, in plain and intelligible language and be legible, in a way appropriate to the means of distance communication used. If the trader approaches the consumer through a telephone call with the aim of concluding a contract, he must disclose his identity and the commercial purpose of the call at the very beginning of the conversation. If the contract is concluded through a medium which allows limited space or time to display the information, e.g. mobile phones, the trader must provide at least the information regarding the main characteristics of the product and the total price on that particular medium prior to the conclusion of the contract, and the other information can be disclosed in another appropriate way.<sup>140</sup> Finally, the consumer must be supplied with the information on a durable medium in reasonable time after the conclusion of the contract, but at the latest at the time of the delivery of the goods. If the contract is for the provision of services, the consumer must receive the information on a durable medium when the performance of the service has begun, unless the information has already been given to the consumer prior to the conclusion of the distance contract.<sup>141</sup>

Based on the negotiations in the Working Party, the compromise text brought about several changes to the original proposal. This is partly due to the fact that the presidency cut out the general information requirements and regulates only the specific information requirements regarding off-premises and distance contracts. The chapter starts with the common information rules for both types of contracts. Under the new Article 9, before the consumer is bound by any contract or offer, the trader shall provide the consumer, in a clear and comprehensible manner, with the following information:

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<sup>138</sup> The requirement that the consumers must be informed of the fact that the contract shall be covered by consumer protection rules is rather a new concept for all Member States. Currently none of the Member States provide for this kind of explicit information requirement.

<sup>139</sup> Article 11.

<sup>140</sup> See Recital 21 of the Preamble: In the case of distance contracts, the information requirements should be adapted to take into account the technical constraints of certain media, such as the restrictions of the number of characters on certain mobile telephone screens or the time constraint on television sales spots. In this case the trader should comply with a minimum set of information requirements and refer the consumer to another source of information, for instance by providing a toll free telephone number or a hypertext link to a webpage of the trader where the relevant information is directly available and easily accessible.

<sup>141</sup> Article 12.

- the main characteristics of the goods or services, to an extent appropriate to the medium and to the goods or services;
- the identity of the trader, such as his trading name, the geographical address at which he is established and details enabling the consumer to contact him rapidly and communicate with him directly and, as the case may be, by electronic means and, where applicable, the geographical address and identity of the trader on whose behalf he is acting;
- if different from his geographical address, the geographical address of the place of business of the trader (and where applicable that of the trader on whose behalf he is acting) to which the consumer should address any complaints;
- the price inclusive of taxes, or where the nature of the goods or services means that the price cannot be calculated in advance, the manner in which the price is calculated, as well as, where applicable, all additional freight, delivery or postal charges and any other costs or, where these cannot reasonably be calculated in advance, the fact that such additional charges and costs may be payable. In the case of a service contract containing a subscription, the price shall include the total subscription costs per periodical time unit. Where the total subscription cost cannot be calculated in advance, the manner in which the price is calculated should be provided; if the trader does not comply with this information requirement, the consumer is not bound to pay the additional charges and costs.<sup>142</sup>
- the cost of using the means of distance communication where it is calculated other than at the basic rate;
- the arrangements for payment and the time and modalities for delivery of goods or for performance of the services;
- where a right of withdrawal applies, the conditions, time limit and procedures for exercising the right and the standard withdrawal form
- where a right of withdrawal does not apply, the information that the consumer will not benefit from a right of withdrawal;
- the duration of the contract and the minimum duration of the consumer's obligations where applicable or if the contract is open-ended, the conditions for terminating the contract;
- the existence of the legal guarantee;
- the existence of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader, where applicable;
- the existence and the conditions of after sale customer assistance, after-sales services, commercial guarantees and complaint handling policy where applicable;
- the possibility for out-of-court dispute resolution, where applicable.<sup>143</sup>

The burden of proof of compliance with the information requirements is incumbent on the trader.<sup>144</sup> The proposal does not regulate the linguistic requirements regarding contractual information, but enables Member States to maintain or introduce such requirements into their national laws.<sup>145</sup>

With respect to the formal requirements for off-premises contracts, the compromise text more or less accommodates the rules of the original proposal. A point of divergence is the provision

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<sup>142</sup> Comp. Text. Article 9. 1a.

<sup>143</sup> Comp. Text. Article 9. 1 (a) - (k)

<sup>144</sup> Comp. Text. Article 9. 3.

<sup>145</sup> Comp. Text. Article 9. 2.

regarding the general rule. According to the new Article 10, the information must be provided on a durable medium, but it also obliges the trader to provide the consumer with the information – when the information is provided on a durable medium in the first place – on paper upon such a request being made by the consumer. The same principle applies to the confirmation of the contract, meaning that it must be sent to the consumer on a durable medium, but if the consumer requests so, also on paper.<sup>146</sup> Regarding the formal requirements for distance contracts<sup>147</sup>, the directive also requires the information to be provided on a durable medium.<sup>148</sup> The consumer must receive confirmation of the contract and all the information on a durable medium, in reasonable time after the conclusion of the contract, and at the latest at the time of the delivery of the goods or when the performance of the service has begun, unless the information has already been given to the consumer prior to the conclusion of the contract on a durable medium.<sup>149</sup> Beside this general requirement, the new article contains more detailed rules for the case when the contract is concluded through a medium which allows limited space or time to display the information<sup>150</sup> and if the trader makes a telephone call to the consumer with a view to concluding a distance contract.<sup>151</sup>

## Right of withdrawal

Chapter III deals with the right of withdrawal in the case of distance and off-premises contracts. Rights of withdrawal and the associated cooling-off periods are fairly new concepts in private law<sup>152</sup>. Since, in the case of distance sales, the consumer is not able to see the good before concluding the contract, he should have a right of withdrawal<sup>153</sup>, which allows him to ascertain the nature and functioning of the goods. As such, the right of withdrawal is usually meant to protect a consumer from making rash decisions: during a relatively short cooling off-period, the consumer may go back on his decision to conclude a contract, sometimes even if

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<sup>146</sup> Comp. Text Article 10. 2.

<sup>147</sup> The directive is without prejudice to the provisions on the conclusion of e-contracts and the placing of e-orders as set out by Articles 9 and 11 of Directive 2000/31/EC of the European Parliament and of the Council. See: Comp. Text Article 11. 4b.

<sup>148</sup> Comp. Text. Article 11. 1.

<sup>149</sup> Comp. Text Article 11. 4.

<sup>150</sup> Article 11. paragraphs 3 of the compromise text provides that, if the contract is concluded through a medium which allows limited space or time to display the information, the trader shall provide the information regarding the main characteristics of the goods or services, the total price, the duration of the contract and, if the contract is open-ended, the conditions for terminating the contract, referred to in Articles 9(1)(a), (caa) and (g) on that particular medium prior to the conclusion of such a contract. The trader shall also inform the consumer where all the information referred to in Article 9 is available. The other information referred to in Article 9 shall be provided by the trader to the consumer in an appropriate way in accordance with paragraph 1.

<sup>151</sup> According to Article 11. paragraph 3a, without prejudice to paragraph 3, if the trader makes a telephone call to the consumer with a view to concluding a distance contract, he shall, at the beginning of the conversation with the consumer, disclose his identity and, where applicable, the identity of the person, on whose behalf he makes a phone call, and the commercial purpose of the call. Member States may introduce or maintain provisions of national legislation providing that the trader, when he has taken the initiative for the contact, has to confirm the offer to the consumer who is committed only once he has signed the offer or sent his written consent. Member States shall notify those provisions to the Commission which shall make this information public in an easily accessible way.

<sup>152</sup> For an overview on the conceptual foundations and justification of the right of withdrawal see: Horst Eidenmüller: Why withdrawal rights?, electronic copy available at: <http://ssrn.com/abstract=1660535>

<sup>153</sup> For a critical assessment on the usefulness of the right of withdrawal see: Jan M. Smits: The right to change your mind? Rethinking the usefulness of mandatory rights of withdrawal in consumer contract law. at pages 6 – 12. Maastricht European Private Law Institute Working Paper No. 2011/01.

that contract has already been performed by the parties.<sup>154</sup> At the European level, the right of withdrawal was introduced by the Doorstep Selling Directive.

The current varying lengths of the withdrawal periods both among the Member States and for distance and off-premises contracts<sup>155</sup> cause legal uncertainty and compliance costs. According to the Commission the same withdrawal period should therefore apply to all distance and off-premises contracts.

*Article 12* of the proposal regulates **the length and starting point of the withdrawal period**. When the consumer orders more than one good from the same trader, he is entitled to exercise the right of withdrawal in respect of each of these goods. Under the new rules, the consumer shall have a period of fourteen days to withdraw from a distance or off-premises contract, without giving any reason. In the case of an off-premises contract, the withdrawal period shall begin from the day when the consumer signs the order form or, in cases where the order form is not on paper, when the consumer receives a copy of the order form on another durable medium. In the case of a distance contract, the withdrawal period shall begin from the day on which the consumer, or a third party other than the carrier and indicated by the consumer, acquires the material possession of each of the goods ordered, or, in the case of a contract for the provision of services, the withdrawal period begins from the day of the conclusion of the contract. If the goods are delivered separately, the withdrawal period starts when the consumer takes material possession of each individual good. Where a good is delivered in different lots or pieces, the withdrawal period begins when the consumer or a third party indicated by the consumer acquires the material possession of the last lot or piece. The Member States shall not prohibit the parties from performing their obligations under the contract during the withdrawal period. If the trader has not provided the consumer with the information on the right of withdrawal, the withdrawal period expires three months after the trader has fully performed his other contractual obligations.

The proposal contains detailed rules on the **exercise of the right of withdrawal** as well. Under *Article 14* the consumer must inform the trader of his decision to withdraw on a durable medium, either in a statement addressed to the trader drafted in his own words or using the standard withdrawal form provided by the directive. Beside these rules, Member States are not allowed to provide for any other formal requirements applicable to this standard withdrawal form. As experience shows that many consumers and traders prefer to communicate via the trader's website<sup>156</sup>, for distance contracts concluded on the Internet, the trader may, in addition to the possibilities discussed, give the option to the consumer to fill in and submit the standard withdrawal form on the trader's website electronically. In that case, the trader must communicate to the consumer an acknowledgement of receipt of such a withdrawal by email without delay.

The **exercise of the right of withdrawal** terminates the obligations of both parties. The trader must reimburse all payments received from the consumer, including those covering the

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<sup>154</sup> Marco B.M. Loos: Rights of Withdrawal, Centre for the Study of European Contract Law Working Paper Series No. 2009/04, p.2

<sup>155</sup> In Malta and Slovenia currently consumers enjoy 15 calendar days cooling-off period. In Cyprus, Czech Republic, Denmark, Estonia, Finland, Latvia, Portugal, Sweden and Germany the length of the cooling-off period is 14 calendar days or two weeks. In the rest of the Member States the length varies between 7 and 10 working days.

<sup>156</sup> CRD preamble 29



expenses borne by the trader to deliver goods to the consumer<sup>157</sup> within thirty days from the day on which he receives the communication of withdrawal. For sales contracts for which the material possession of the goods has been transferred to the consumer or at his request, to a third party before the expiration of the withdrawal period, the consumer shall send back the goods or hand them over to the trader or to a person authorised by the trader to receive them, within fourteen days from the day on which he communicates his withdrawal to the trader, unless the trader has offered to collect the goods himself. The consumer can only be charged for the direct cost of returning the goods unless the trader has agreed to bear that cost.<sup>158</sup> In order to avoid the trader reimbursing a consumer who has not returned the goods, the trader may withhold the reimbursement until he has received or collected the returned goods, or the consumer has supplied evidence of having sent back the goods, whichever is the earlier.

At this point it is worth taking a look at the present state of case law in this regard based on the Distance Selling Directive. The Court of Justice of the European Union has already faced the issues of both the deployment of the costs of delivery on the consumer in the event of withdrawal and the issue of the issue of compensation for use of the goods supplied in the event of withdrawal within the withdrawal period. Starting with the latter, the issue was at stake in *Pia Messner*<sup>159</sup>. The reference for a preliminary ruling concerned the interpretation of Article 6(2)<sup>160</sup> in conjunction with the second sentence of the first subparagraph of Article 6(1)<sup>161</sup> of Directive 97/7/EC. By its question, the referring court asked whether the cited provisions should be interpreted as precluding a provision of national law which provides that, in the case of withdrawal by a consumer within the withdrawal period, a seller may claim compensation for the value of the use of consumer goods acquired under a distance contract. The Court, before answering this question, referred to preamble 14<sup>162</sup> of the directive emphasising that the right of withdrawal is intended to offset the disadvantage for the consumer resulting from a distance contract by granting him an appropriate period for

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<sup>157</sup> CRD preamble 30

<sup>158</sup> Art. 17.1.

<sup>159</sup> This was not the first time that the issue of compensation for the use of goods has been addressed before the Court of Justice of the European Union. *Quelle* [Case C-404/06] concerned the question whether, in the case of a replacement for consumer goods which are not in conformity with the contract of sale, a seller may require the consumer to pay compensation for the use of those goods under the rules of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees. In *Quelle* the Court concluded that Article 3 is to be interpreted as precluding national legislation, under which a seller who has sold consumer goods which are not in conformity may require the consumer to pay compensation for the use of those defective goods until their replacement with new goods. (para 43 of the Judgment)

<sup>160</sup> Article 6 - Right of withdrawal

2. Where the right of withdrawal has been exercised by the consumer pursuant to this Article, the supplier shall be obliged to reimburse the sums paid by the consumer free of charge. The only charge that may be made to the consumer because of the exercise of his right of withdrawal is the direct cost of returning the goods. Such reimbursement must be carried out as soon as possible and in any case within 30 days.

<sup>161</sup> Article 6 - Right of withdrawal

1. For any distance contract the consumer shall have a period of at least seven working days in which to withdraw from the contract without penalty and without giving any reason. The only charge that may be made to the consumer because of the exercise of his right of withdrawal is the direct cost of returning the goods.

<sup>162</sup> (14) Whereas the consumer is not able actually to see the product or ascertain the nature of the service provided before concluding the contract; whereas provision should be made, unless otherwise specified in this Directive, for a right of withdrawal from the contract; whereas, if this right is to be more than formal, the costs, if any, borne by the consumer when exercising the right of withdrawal must be limited to the direct costs for returning the goods; whereas this right of withdrawal shall be without prejudice to the consumer's rights under national laws, with particular regard to the receipt of damaged products and services or of products and services not corresponding to the description given in the offer of such products or services; whereas it is for the Member States to determine the other conditions and arrangements following exercise of the right of withdrawal;

reflection during which he can examine and test the goods acquired.<sup>163</sup> The prohibition laid down in Directive must be interpreted in the light of this objective. In this regard the Court noted that a general requirement to pay compensation for the value of the use of consumer goods acquired under a distance contract is incompatible with this objective. Moreover, the efficiency and effectiveness of the right of withdrawal would be impaired if the consumer were obliged to pay compensation simply because he had examined and tested the goods acquired under a distance contract. To the extent to which the right of withdrawal is intended precisely to give the consumer that opportunity, the fact of having made use of it cannot have the consequence that the consumer is able to exercise that right only if he pays compensation. The Court concluded that the referred provisions of the Directive must be interpreted as precluding a provision of national law which provides in general that, in the event of withdrawal by a consumer within the withdrawal period, a seller may claim compensation for the value of the use of the consumer goods acquired under a distance contract. However, these provisions do not prevent the consumer from being required to pay compensation for the use of the goods if he has made use of those goods in a manner incompatible with the principles of civil law, such as those of good faith or unjust enrichment, on condition that the purpose of that directive and, in particular, the efficiency and effectiveness of the right of withdrawal are not adversely affected, this being a matter for the national court to determine.<sup>164</sup>

In *Heine*<sup>165</sup> the Court faced the issue of charging the consumer with the cost of delivering the goods. In its judgment the Court interpreted the phrases both “sums paid by the consumer”<sup>166</sup> and “because of the exercise of his right of withdrawal”<sup>167</sup>, and reached the conclusion that relevant provisions of the directive must be interpreted as precluding national legislation which allows the supplier under a distance contract to charge the costs of delivering the goods to the consumer where the latter exercises his right of withdrawal.

According to the proposal, if the consumers exercise their right of withdrawal after having used the goods to an extent more than necessary to ascertain the nature and functioning of the

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<sup>163</sup> Para 20.

<sup>164</sup> Paras 22 – 29.

<sup>165</sup> Case C-511/08

<sup>166</sup> Paras 42 – 47. Directive 97/7, under Article 4 thereof, makes a distinction between the price of the goods and the delivery costs only in relation to the information to be made available to the consumer by the supplier prior to conclusion of the contract. By contrast, as regards the legal consequences of the withdrawal, that directive does not make such a distinction and thus covers all of the sums paid by the consumer to the supplier. That interpretation is also confirmed by the very wording of the phrase „the only charge that may be made to the consumer”, used in Article 6(2), second sentence, to designate „the direct cost of returning the goods”... the words ‘the only charge’ make a strict interpretation of that provision necessary and render that exception exhaustive...[c]onsequently, it is apparent from the above that the term ‘sums paid’ in Article 6(2), first sentence, of Directive 97/7 encompasses all of the sums paid by the consumer to cover the costs incurred under the contract, subject to the interpretation to be given to Article 6(2), second sentence, of that directive.

<sup>167</sup> Paras 48 – 54. The interpretation of Article 6(1), first subparagraph, second sentence, and Article 6(2), second sentence, of Directive 97/7, to the effect that those provisions relate to all of the costs incurred by the conclusion, performance and termination of the contract which may be charged to the consumer if he exercises his right of withdrawal, is in line with the general scheme and purpose of the directive. First, that interpretation is supported by the fact that, even in the language versions of Directive 97/7 which use, in Article 6, the term ‘because of’ or a similar expression, recital 14 in the preamble to the directive refers to the costs borne by the consumer ‘when exercising the right of withdrawal’. It follows that ... the directive relate to all of the costs incurred under the contract and not only costs incurred following the exercise of the right of withdrawal and caused by it.... [S]econd, the purpose of Article 6 of Directive 97/7, ... [is] not to discourage consumers from exercising their right of withdrawal, it would be contrary to that objective to interpret Article 6 as authorising the Member States to allow delivery costs to be charged to consumers in the event of such withdrawal.

good, the consumer is liable for any diminished value of the goods.<sup>168</sup> In order to ascertain the nature and functioning of a good, the consumer may only handle or try it in the same manner as he would be allowed to do in a shop. For example, the consumer should only try on a garment and should not be allowed to wear it.<sup>169</sup> However, consumers are not liable for the diminished value where the trader has failed to provide notice of the withdrawal right.<sup>170</sup>

In order to ensure the effectiveness of the withdrawal right in service contracts, in particular for non-urgent renovation works (for which consumers may be subject to high pressure selling at their homes followed by the immediate performance of the service before the expiration of the withdrawal period<sup>171</sup>), in the event of exercising the right of withdrawal, the consumer shall bear no cost for services performed, in full or in part, during the withdrawal period.<sup>172</sup>

### **Exceptions from the right of withdrawal**

Article 19 governs the exceptions from the right of withdrawal. The proposal makes a distinction here, and contains different rules for distance contracts and off-premises contracts.

Regarding distance contracts, the proposal lists eight instances where the cooling off period does not apply. These include services, where performance has begun, with the consumer's prior express consent, before the end of the fourteen day period; the supply of goods or services for which the price is dependent on fluctuations in the financial market which cannot be controlled by the trader; the supply of goods made to the consumer's specifications or clearly personalised or which are liable to deteriorate or expire rapidly; the supply of wine, the price of which has been agreed upon at the time of the conclusion of the sales contract, the delivery of which can only take place beyond the time-limit referred to in Article 22(1) and the actual value of which is dependent on fluctuations in the market which cannot be controlled by the trader; the supply of sealed audio or video recordings or computer software which were unsealed by the consumer; the supply of newspapers, periodicals and magazines; gaming and lottery services; and contracts concluded at an auction. Most of these exceptions were already present in the distance selling directive. However, what is new to the earlier directive is that the proposal contains a definition regarding the concept of auction. Regarding off-premises contracts, the right of withdrawal does not apply to contracts for the supply of foodstuffs, beverages or other goods intended for current consumption in the household, selected in advance by the consumer by means of distance communication and physically supplied to the consumer's home, residence or workplace by the trader who usually sells such goods on his own business premises; contracts for which the consumer, in order to respond to an immediate emergency, has requested the immediate performance of the contract by the trader; if, on this occasion, the trader provides or sells additional services or goods other than those which are strictly necessary to meet the immediate emergency of the consumer, the right of withdrawal shall apply to those additional services or goods; contracts for which the consumer has specifically requested the trader, by means of distance communication, to visit his home for the purpose of repairing or performing maintenance upon his property; if on this occasion, the trader provides services in addition to those specifically requested by the consumer or goods other than replacement parts necessarily used in performing the maintenance or in making the repairs, the right of withdrawal shall apply to those additional

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<sup>168</sup> CRD preamble 31

<sup>169</sup> CRD preamble 31

<sup>170</sup> Art. 17. 2.

<sup>171</sup> CRD preamble 31

<sup>172</sup> Art. 17. 2.

services or goods.<sup>173</sup> The proposal makes it possible for the parties to contract out of these rules, meaning that they may agree not to apply these exceptions.<sup>174</sup>

The other possible way to limit the applicability of the right of withdrawal is excluding certain contracts. The proposal regulates the exclusions at three levels: first, the contracts that are excluded regardless of the way they are concluded (off-premises contract or distance contracts)<sup>175</sup>; the second lists the contracts for which the right of withdrawal does apply when concluded off-premises<sup>176</sup>, and the third names the excluded distance contracts<sup>177</sup>.

The only case where the ECJ faced the issue of the material scope of a right of withdrawal was *easyCar*.<sup>178</sup> In *easyCar* the interpretation of Article 3(2) of Directive 97/7/EC was at stake. The Court of Justice was asked to clarify how far car hire contracts can be regarded as “contracts for the provision of ... transport services” within the meaning of the referred provision of the directive. Article 3(2) of the Directive makes a derogation from the scope of the Distance Contracts Directive in relation to Articles 4, 5, 6 and 7(1) of the Directive, and thereby also creates a derogation from the right to cancel which consumers are to enjoy under Article 6. The Commission agreed that Article 3(2) does not cover car hire contracts. That, it argued, is obvious from the natural interpretation of the word ‘transport’. “Transport” means the movement of persons or things from one place to another. It thus includes an active element, which is absent in the case of the mere provision of hire cars. The Commission further argued that the aim of the legislature was also to remove from its scope services in respect of which cancellation close to the time of performance would lead to severe consequences for the undertaking providing the service. That risk is not present in the case of car hire, since there the vehicle returns to the ‘pool’ of available vehicles, and thus remains at the disposal of the undertaking.<sup>179</sup>

The Court however concluded that self-drive car hire services are exempt from the cancellation provisions of the directive, that is, car-hire services are considered to be services relating to transport. The reasoning provided by the Court was based on an interpretation that the purpose of the transport services and similar exemptions was to protect the interests of suppliers who would otherwise suffer disproportionate consequences if customers were able

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<sup>173</sup> Art. 19. 2.

<sup>174</sup> Art. 19. 3.

<sup>175</sup> Article 20 Excluded distance and off-premises contracts

1. Articles 8 to 19 shall not apply to distance and off-premises contracts:

(a) for the sale of immovable property or relating to other immovable property rights, except for rental and works relating to immovable property;  
(b) concluded by means of automatic vending machines or automated commercial premises;  
(c) concluded with telecommunications operators through public payphones for their use;  
(d) for the supply of foodstuffs or beverages by a trader on frequent and regular rounds in the neighbourhood of his business premises.

<sup>176</sup> Article 20 2. Articles 8 to 19 shall not apply to off-premises contracts relating to:

(a) insurance,  
(b) financial services whose price depends on fluctuations in the financial market outside the trader's control, which may occur during the withdrawal period, as defined in Article 6(2)(a) of Directive 2002/65/EC1 and  
(c) credit which falls within the scope of Directive 2008/48/EC.

<sup>177</sup> Article 20 3. Articles 8 to 19 shall not apply to distance contracts for the provision of accommodation, transport, car rental services, catering or leisure services as regards contracts providing for a specific date or period of performance.

<sup>178</sup> Case C-336/03 *easyCar* (UK) Ltd v Office of Fair Trading, ECR 2005 I-01947

<sup>179</sup> See: paras 29-30.

to cancel contracts at no expense and with no explanation.<sup>180</sup> The decision was good news not only for the online car hire companies, but also for the online travel industry as a whole, as it confirms that the exemption for transport services applies widely to travel services across the sector, and not simply to contracts of carriage such as airline and train bookings.

### Closing remarks

As has been demonstrated, the way the proposal already took from the first publication in 2008 until the IMCO voting in 2011 was not an easy route. Commissioner Meglena Kuneva, at the press conference organised on the occasion of the issue of the proposal in October 2008, started her speech by expressing her pleasure “to announce good news for Europe's 500 million consumers.”<sup>181</sup> However, the future directive should be good news not only for consumers but also for traders. As it turned out during the negotiations in the Union institutions, the proposal as it was submitted did not achieve this aim. Meanwhile, not only the stumbling blocks in the proposal have been questioned – e.g. the proposed revolutionary full-harmonisation approach – but even the question whether there really is a need for the directive to boost consumer confidence appeared on the horizon. Moreover, the work on the *Draft Common Frame of Reference*<sup>182</sup> has been re-initiated; the result of the work of the working group responsible for the drafting the DCFR is expected in early 2011. The question regarding the legal status and role of the DCFR is still open. The coming spring therefore might be as least as revolutionary for European contract law as the '80s were for the birth of the Internal Market.

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<sup>180</sup> See: paras 18 – 31.

<sup>181</sup> SPEECH/08/507

<sup>182</sup> On this issue see: Martijn W. Hesselink: The Common Frame of Reference as a Source of European Private Law, paper presented at the International Colloquium Celebrating the Bicentennial of the Louisiana Civil Code 1808-2008, on 19-22 November 2008 at Tulane University, New Orleans, available at: <http://ssrn.com/abstract=127056>, Timothy Q. de Booys, Martijn W. Hesselink, Chantal Mak: How the CFR can improve the Consumer Rights Directive - A comparison between the model rules in the draft Common Frame of Reference and the European Commission's proposal for a Consumer Rights Directive, Centre for the Study of European Contract Law Working Paper Series No. 2009/09, Martijn W. Hesselink: The Consumer Rights Directive and the CFR: two worlds apart?, Briefing note prepared for a European Parliament expert hearing (IMCO Committee) concerning the proposal for a directive on consumer rights, on 2 March 2009 Brussels.